No. 78-599

In the Supreme Court of the United States

OCTOBER TERM, 1978

SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

PRIVATE FRANK L. HUFF, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Our petition noted (Pet. 11 n.9) that two district court decisions, then pending on appeal, had held the regulations challenged in this case to be unconstitutional. These cases now have been decided on appeal. In *Allen* v. *Monger*, No. 76-1125 (9th Cir. Oct. 4, 1978) (App., *infra*, 1a-12a), the court of appeals relied on the decision and reasoning of the District of Columbia Circuit in this case for its conclusion that 10 U.S.C. 1034 bars application of the challenged regulations to require the approval of base command-

ers prior to circulating petitions to Members of Congress on military bases. In *Glines* v. *Wade*, No. 76-1412 (9th Cir. Oct. 5, 1978) (App., *infra*, 13a-27a), the court held that, insofar as the challenged regulations apply to petitions addressed to persons other than Members of Congress,[1] the prior approval requirement is substantially overbroad and violates the First Amendment.[2]

These decisions reinforce our concern that the courts of appeals improperly have left the military departments powerless to stop the on-base circulation of petitions, and now other materials as well, even when such materials pose a clear danger to military discipline, loyalty or morale, and even when they materially undermine the effective accomplishment of the assigned military mission.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

[1] One of the petitions involved in that case was addressed to the Secretary of Defense (App., *infra*, 21a).

[2] The Solicitor General is considering whether to file a petition for writs of certiorari in *Allen* and *Glines*.

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-1125

WAYNE M. ALLEN ET AL., APPELLEES

v.

A. J. MONGER ET AL., APPELLANTS

GEORGE T. MOSES ET AL., APPELLEES

v.

S. R. FOLEY, JR., ET AL., APPELLANTS

Oct. 4, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a decree enjoining enforcement by the Navy of regulations restricting sailors in the circulation of petitions addressed to members of Congress. We affirm.

* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

In the spring of 1973 some crew members on two aircraft carriers stationed in Alameda, California, prepared petitions to various members of Congress, objecting to planned movements of their ships. Certain enlisted men of the U.S.C. Hancock objected to another West Pacific cruise. Some crew members of the U.S.S. Midway opposed its intended homeporting in Japan.

The Hancock protesters had their petition [1] printed off the base, and requested Captain (now Admiral) Monger, the Hancock's commanding officer, to authorize its distribution. Captain Monger denied permission, citing U.S.S. Hancock Instruction 1620.4A, which was based on Naval Instruction 1620.1. These instructions require prior approval for the distribution of printed materials. The commander may deny permission if the materials present "a clear danger to the loyalty, discipline, or morale of military personnel" or if the distribution "would materially interfere with the accomplishment of a military mission." Captain Monger said that circulating the petition might upset the morale and discipline of a green crew preparing for a new cruise.

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[1] The Hancock petition said:

"Dear Congressman Stark,

We, the undersigned crew members of the U.S.S. HANCOCK, in recognition of the fact that the United States is officially no longer at war with the countries of Indo-China, and because the HANCOCK has already been in commission for 29 years, respectfully request that you ask Congress to investigate the necessity of having the HANCOCK make another West Pacific cruise."

One protester distributed the petition despite Captain Monger's action, and was subsequently punished at a Captain's Mast. Other sailors were deterred from circulating the petition.

Certain crew members on the Midway also sought to circulate a petition to members of Congress opposing a proposed change in home ports.[2] Like the Hancock petition, the Midway petition did not suggest that anyone should disobey an order or otherwise refuse to do his duty. This petition was also printed off base at no expense to the government. The peti-

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[2] The Midway petition said:

"We, the crew and families of the U.S.C. Midway, do hereby exercise our rights as citizens of the United States of America to petition Congress on the following issue. We object to the homeporting in Yokosuka, Japan of the U.S.S. Midway for the following reasons:

"(1) We are freely opposed to the excessive expansion and imposition of United States military forces overseas. Homeporting the Midway in Yokosuka is another attempt by the U.S. to permanently establish its military preesnce in Asia.

"(2) We object to the false statements made by the military that there is an *all volunteer* crew to deploy to Yokosuka.

"(3) We disapprove of the government's lack of preparations in providing housing and other living accommodations to support our full complement of crew and families.

"(4) It is the right of all military personnel as citizen-soldiers of the U.S. to practice individually or collectively their rights as citizens, namely, (a) the right to free speech, (b) the right to peacefully assemble, (c) freedom of the press, and (d) the right to petition Congress."

tioners requested Captain (now Admiral) Foley, the Midway's commander, to permit circulation of the petition, and he refused. He later refused to permit circulation of a slightly modified petition. He based his refusal upon Midway Instruction 1620.6, which was also derived from Naval Instruction 1620.1. Because of Captain Foley's decision, the Midway petitioners did not circulate the petition on board ship.

Both the Hancock and the Midway protesters filed actions in district court, alleging that the restrictions on petitioning were unconstitutional abridgements of their First Amendment rights and that they violated 10 U.S.C. § 1034.

The district court consolidated the cases. The court then held the cases in abeyance pending naval administrative-review process. After at least one sailor from each ship lost his administrative appeal, the district court certified the actions as class actions.

The district court held that the regulations would have a chilling effect on the exercise of First Amendment rights, and held them to be invalid as applied and overbroad. The court also held that the regulations violated § 1034. The court enjoined enforcement, but provided the Navy leave to promulgate new regulations that would limit the time, place, and manner of petitioning to avoid interference with the ships' functioning. *Allen* v. *Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975). The government appeal challenges the decrees in several respects.

I. MOOTNESS

A preliminary issue is whether the case is moot. The district court found jurisdiction under 28 U.S.C. § 1331. We have applied § 1331, as it stands after the 1976 amendment deleting the $10,000 jurisdictional amount, to a case filed before the amendment passed. *Stickelman* v. *United States*, 563 F.2d 413, 415 n.2 (9th Cir. 1977). Subject-matter jurisdiction under § 1331 has been satisfied.

The Hancock is no longer in service, and most, if not all, of the petitioners have since been discharged. The government therefore suggests that these cases are moot. Similar regulations, however, remain in effect throughout the Navy. No one now seeks to circulate the Hancock or Midway petitions. It is unlikely that any similar petition could keep the issue alive long enough for a case to reach this court on appeal. Military enlistments are for a few years at a time. Any particular plaintiff probably would complete an enlistment before he or she could complete the judicial process. Yet the regulations raise serious questions that deserve judicial review. These regulations and the resulting issues are clearly "capable of repetition, yet evading review," and therefore are not moot. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911), *quoted in Roe* v. *Wade*, 410 U.S. 113, 125, 93 St.Ct. 705, 35 L.Ed.2d 147 (1973).

II. PROTECTION FOR PETITIONING

On appeal, the petitioners again urge their constitutional arguments. However, because the district court's decision may be upheld on purely statutory grounds, we have no occasion to reach the constitutional issue.

Title 10 U.S.C. § 1034 provides:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

We must decide, first, whether § 1034 applies to concerted activities such as petitions, and, second, whether the regulations which prohibited the circulation of the petition are "necessary to the security of the United States."

The District of Columbia Circuit recently considered both questions and held that § 1034 covers petitioning and that these regulations are not necessary to the national security. *Huff* v. *Secretary of the Navy*, —— U.S.App.D.C. ——, 575 F.2d 907 (1978). We agree.

Section 1034 prohibits restrictions on communications with Congress; it does not by its terms distinguish among different kinds of communications. Congress would no doubt consider a signed petition addressed to members of Congress to be communication with it.

Some military personnel might find it easier to communicate by signing a petition than by writing a letter. Others might believe that one petition signed by many voters would have more impact than scattered individual letters. While the statute speaks of "any member", we do not think its use of the singular is controlling. A literal reading would deny protection even to a letter if two people drafted and signed it. We prefer to read the statute in light of the traditional ways Americans communicate with their legislators; petitioning is traditional.

Congressman John W. Byrnes of Wisconsin first introduced the issue in the debates on the Universal Military Service and Training Act of 1951, Pub.L. 82-51, 65 Stat. 75 (1951). He did so because of the difficulty one of his constituents in the Navy asserted in writing him about an individual problem. The colloquy between Congressman Byrnes and Congressman Vinson, chairman of the House Armed Services Committee, primarily inquired into the current regulations to determine their effect upon communications concerning individual grievances. As originally adopted, the amendment prohibited drafting anyone into a branch of the armed forces that limited the rights of its members to communicate directly with members of Congress. 97 Cong.Rec. 3775-76 (April 12, 1951).

Since Congressman Byrnes' original amendment was to a proposed substitute to the pending bill, it lapsed when the substitute was defeated. Congressman Vinson wrote a different version, which Con-

gressman Byrnes approved and eventually introduced the next day. This version is the one Congress adopted, and, with minor amendments made in 1956, it is the source of § 1034.[3] Under this proposal, no member of the armed forces could be restricted from communicating "directly or indirectly" with any member or members of Congress "concerning any subject" unless the communication violated a law or a regulation necessary to the security and safety of the United States. 97 Cong.Rec. 3877, 3883 (April 13, 1951). While Congressman Vinson again described the statute as one letting any man write his congressman, the language indicated a broader purpose. It did not simply cover all branches instead of just those taking draftees; it also changed the nature of the right given.

Congressman Byrnes' original concern was with military persons facing individual hardships who wanted their congressman's help. His emphasis was on Navy regulations which seemed to limit direct communication on personal problems. The Congressman did not then object to Army regulations which severely restricted communications on general legislative matters. Letters of the Secretary of the Navy and of the Secretary of the Army to Congressman Byrnes, in 97 Cong.Rec. 3776 (April 12, 1951).

The Vinson modification, however, prohibited restrictions on communications "on any subject". This

[3] Act of June 19, 1951, Pub.L.No. 82-51, § 1(d) (last paragraph), 65 Stat. 78.

modification was made a day or two after President Truman's dismissal of General MacArthur, in part for his communicating with Congress outside regular channels, and about a week before the general addressed a joint session of Congress.[4] In this light, it seems clear that Congress was willing to break with traditional notions of military discipline in order to assure that Congress would receive communications reflecting a variety of military sentiment on important issues. In this change, Congress went well beyond Congressman Byrnes' original focus on individual grievances.

The Vinson proposal also allowed communicating "directly or indirectly" with members of Congress. This phrase may have been inspired by General MacArthur's use of press conferences, but it may also have been intended to cover enlisted persons who simply chose to sign petitions. Petitioners communicate with Congress, but they do so indirectly, by showing their approval of language someone else has written rather than by writing their own language. Congress deleted the "directly or indirectly" phrase, along with "concerning any subject", in 1956 when it adopted current § 1034. The codifiers note, correctly,

[4] Congressmen debated the bill with MacArthur's dismissal in mind. The issue immediately before Congressman Byrnes introduced the final version was a proposed amendment to give the commander in the field all power to decide what supply facilities, troop concentrations, and other targets to bomb. MacArthur's objections to the restraints President Truman placed on him in these regards were, of course, a major issue in his removal. 97 Cong.Rec. 3883 (April 13, 1951).

we believe, that the language was surplusage. The 1956 changes, therefore, did not change the statute's meaning. 10 U.S.C. § 1034, explanatory note.

The 1956 amendment also changed "member or members of Congress" to "member of Congress"; again, the change was to eliminate surplusage. This treatment of the plural encourages us to give less weight to the singular "any member of an armed force" in § 1034. Congress clearly intended to protect communication with several members of Congress at a time, even though it used the singular; while the record is not so clear, it is unlikely that Congress intended to restrict protected communication by more than one member of the armed forces at a time.

We therefore hold that § 1034 protects petitioning. The importance petitioning Congress has played in our history, combined with a legislative history that shows Congress concerned to keep communications open despite threats to discipline and a history of verbal changes in the statute that encourages a broad interpretation of its protections, all lead to this conclusion. The right to petition, of course, includes a reasonable opportunity to solicit signatures for the petition.

III. PRIOR RESTRAINTS

Naval Instruction 1620.1 and the related instructions on the Hancock and the Midway establish a system of prior restraint on petitions to Congress. They do not distinguish between ships at port in home waters and ships actively engaged in combat in a

combat zone. Under § 1034 these regulations are valid only if they are "necessary to the security of the United States". *Huff* v. *Secretary of the Navy*, —— U.S.App.D.C. at ——, 575 F.2d at 914. As did the District of Columbia Circuit in *Huff*, we hold that the Navy has failed to show that the national security required a system of prior restraints in these cases.

Both commanding officers apparently thought that circulation of the petitions might affect the discipline and morale of their commands. The actual circulation on the Hancock had produced some resentment among nonpetitioning sailors.[5] The district court took the view that time, place, and manner regulations could insure that petitioning would not disrupt the ships' orderly operations. The Uniform Code of Military Justice under certain circumstances enables the Navy to punish a crew member whose petition is truly disruptive. These petitions, while they were disagreeable to the Navy, did not threaten the national security.

The standard of protection under § 1034 is high. Congress in adopting it consciously chose to give communication with Congress preference over the prefer-

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[5] No commanding officer relishes the prospect of having a well-trained and dedicated military unit branded as "crybabies" by the patrons of service clubs, messes, and waterfront taverns. The damage to morale and the nuisance of resulting disorders cannot be ignored. The prospect of these dysfunctional results from the exercise of the rights protected by the statute apparently did not weigh as heavily upon the members of Congress as did the desire to keep communications open.

ences of military commanders. Prior restraints are suspect in the constitutional context. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). They stand no better in a statutory setting. Well publicized petitions may inconvenience the military. Some petitions may even produce division and morale problems, but we canot say that there is no less restrictive method than total prior restraint to protect the national security. Since the regulations are overbroad and exceed the needs of the national security, we affirm the district court.

Greer v. *Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), which the government emphasizes, does not apply to this case. *Greer* rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit.

Affirmed.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-1412

ALBERT EDWARD GLINES, APPELLEE

v.

JAMES L. WADE, Commander 349th Material Airlift Wing, MAJOR GENERAL GONGE, Commander 22nd Air Force, JOHN L. MCLUCAS, Secretary of the Air Force, JAMES SCHLESINGER, Secretary of Defense, APPELLANTS

Oct. 5, 1978

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and HUG, Circuit Judges, and PALMIERI,* District Judge.

GOODWIN, Circuit Judge:

The government appeals a judgment ordering reinstatement in the Air Force, back pay, and declaratory relief which struck down as unconstitutional certain Air Force regulations.

We affirm the nonmonetary parts of the judgment but vacate that portion awarding back pay as beyond the jurisdiction of the district court to grant.

Albert Glines was a Captain in the Air Force Reserves. While on active duty, he took training as a

* The Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

navigator instructor. Air Force standards describing maximum hair length offended him. To show his opposition, he drafted essentially identical petitions to several members of Congress and to the Secretary of Defense.[1] He intended to seek signatures to the petitions at his home station, Travis Air Force Base. Captain Glines learned, however, that Air Force Regulation 30-1(9) prohibits "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * unless first authorized by the commander" and that AFR 35-15(3)(a)(1) prohibits the distribution of "any printed or written material * * * within any Air Force installation without permission of the Commander or his

[1] The petitions were identical except for the names of the person to whom they were directed and of the others to whom petitions were also being sent. That to the Secretary of Defense read:

"Dear Secretary of Defense:

"We the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

"We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

"We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem."

designee."[2] Because of these regulations, Captain

[2] AFR 30-1(9) reads:

"9. *Right of Petition.* Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander."

AFR 35-15(3)(a) reads:

"3. *Specific Guidelines and Prohibited Activities:*

a. *Possession and Distribution of Written or Printed Materials:*

(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander of his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be im-

Glines first circulated the petitions off base. Later he decided to ignore the regulations and to circulate the petitions on base. He also shaved his head.

The record does not show whether Captain Glines actually circulated the petitions on the Travis reservation. In April 1974, during a stopover at Guam, he gave copies of the petitions to a Sergeant Wolf. Sergeant Wolf gained eight signatures on Guam before base authorities learned of his activities, stopped them, and helped the signatories learn "the error of their ways". The Air Force immediately removed Captain Glines from active duty and soon afterwards reassigned him to the standby reserves. As a "standby" he was unable to complete his navigator instructor instructor training and lost other benefits.

Captain Glines brought this action alleging that the regulation of petitions violated 10 U.S.C. § 1034 and the First Amendment. He sought reinstatement and back pay. The district court declared the regulations void for statutory and constitutional infirmities, ordered Captain Glines reinstated in the active re-

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pounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues."

serve, and awarded him more than $22,000 in back pay. *Glines* v. *Wade*, 401 F.Supp. 127 (N.D.Cal. 1975). The government appeal challenges the judgment on a number of grounds.

I. *Exhaustion of Administrative Remedies*

The government first argues that the district court should have required Captain Glines to seek relief from the Air Force Board for the Correction of Military Records (AFBCMR) before bringing this action. This point is not well taken.

Captain Glines' claim depends on constitutional and statutory interpretations which are beyond the scope of the jurisdiction of the AFBCMR. While the government treats the case as simply a claim for reinstatement and back pay, Captain Glines also sought and received a declaratory judgment invalidating the challenged regulations. Without this judgment he would remain subject to the regulations after his reinstatement. "Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

The AFBCMR was never intended by Congress to resolve the essentially legal issues involved in this case. Like other BCMRs, it is a clemency-oriented body, with authority to "correct an error or remove an injustice," 10 U.S.C. § 1552(a), not to declare the law. The Board simply substitutes for private congressional bills its remedy for individual grievances.

Congress stopped accepting such private bills when it authorized the BCMRs. 2 U.S.C. § 190g. BCMRs are not necessarily legally trained. They get their legal advice from the Judge Advocate General's office. *See, e.g., Flute* v. *United States*, 535 F.2d 624, 627-28, 210 Ct.Cl. 34 (1976). The AFBCMR has no authority to declare the challenged regulations invalid. Even if it gave Captain Glines all the redress within its power, it would not be able to protect him from further attempts by the Air Force to enforce its regulations. Only a court can do so.[3]

We recently held that a district court may require exhaustion to a BCMR, in its discretion, after balancing the relevant factors. *Montgomery* v. *Rumsfeld*, 572 F.2d 250, 252-54 (9th Cir. 1978). The district court, of course, did not have the opportunity to do the balancing we suggested in *Montgomery*. However, the district court did not in this case require exhaustion, and, for the reasons indicated, we agree with the district court.

II. *Statutory Claim*

10 U.S.C. § 1034 prohibits restrictions on communications between members of the military and members of Congress unless the communication is unlawful or the restrictions are necessary to the national security.[4] In *Allen* v. *Monger*, —— F.2d —— (slip opin. p. 3239) (9th Cir. 1978), we struck down under § 1034 Naval regulations requiring prior approval for the circulation of petitions on a ship at port in the United States. We held that the Navy's system of prior restraints was not necessary to the national security in the factual situation described in the *Allen* case.

The District of Columbia Circuit has upheld similar restrictions when applied to an actual combat zone. *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 511 F.2d 1327 (1975). On the other hand, the same court has struck down regulations inconsistent with § 1034 when they were applied to a combat-ready base in Japan. *Huff* v. *Secretary of the Navy*, 188 U.S.App. D.C. ——, 575 F.2d 907 (1978). The base commander filed an affidavit emphasizing the combat-ready nature of the base, but the majority found his argument unpersuasive.

The record now before us does not indicate the precise nature of the base on Guam where Captain Glines handed Sergeant Wolf the petitions. The government has not shown that Guam was more sensitive or that petitioning on that base was inherently

[3] *Schlesinger* v. *Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1974), which the government cites, involved a district court's authority to enjoin a court-martial allegedly acting in excess of its jurisdiction. A courtmartial is, of course, a legally oriented body, as are the military appeals courts. They are competent to decide their own jurisdiction, and they do not take their legal advice directly from the Judge Advocate General's office.

[4] 10 U.S.C. § 1034 reads:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulatio nnecessary to the security of the United States."

more disruptive than was true of the base involved in *Huff*. While prior restraints on petitioning may promote some military objectives, the government has not shown that such restraints are actually necessary to the national security outside of a combat zone.

Despite proper deference to the military's ability to judge the impact of unauthorized petitioning on discipline, we do not believe the government has shown that the bad effects of petitioning would endanger the national security in these circumstances.[5] This is a determination we must make independently, for Congress in adopting § 1034 has consciously restricted military command discretion on this point.

Only if we determine that the petitions are a threat to national security can we uphold the military restriction. "[W]e do not think that the national security can be said to require that the objective of military discipline be pursued to the exclusion of all other interests. If this were the case, then § 1034 would be a nullity, for restrictions on petitioning activity, as on other types of speech, can always be said to decrease the possibility of lapses of military discipline." *Huff* v. *Secretary of the Navy*, 188 U.S.App.D.C. at ——, 575 F.2d at 914. Congress adopted § 1034 because it preferred free communication with military personnel to absolute discipline in the military; AFR

[5] Glines was disciplined for violating the regulations requiring prior approval. The Air Force does not contend that he did anything else that would have subjected him to discipline.

30-1(9) and 35-15(3)(a) improperly ignore the Congressional policy.[6]

III. *Constitutional Claims*

Read literally, § 1034 protects only the four petitions addressed to members of Congress. One petition, which was essentially identical to the others, was addressed to the Secretary of Defense. This petition requires us to decide whether the First Amendment also protects Glines' activities.

It is clear that these regulations would be unconstitutional on their face if they applied to the public at large. Prior restraints on speech face a heavy burden of justification, which they are seldom able to meet. *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). First Amendment rights do not expire upon enlistment in a military arm, although the needs of the service may modify the extent of the application of these rights. "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." *Parker* v. *Levy*, 417 U.S. 733, 758-59, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), quoting, at 759, 94 S.Ct. at 2563, *United States* v. *Gray*, 20 U.S.C.M.A. 63 (1970). The issue

[6] This discussion assumes that military discipline and free speech are necessarily incompatible. There is a strong argument to the contrary. Donald N. Zillman, *Free Speech and Military Command*, 1977 Utah L.Rev. 423, 433-34.

in *Parker* v. *Levy* was whether various Articles of the Uniform Code of Military Justice were too vague to support a conviction for statements urging enlisted men to disobey orders. The Supreme Court held that they were not. There was no prior restraint involved.

The First Amendment protects this country's basic commitment to open and vigorous debate. We have assumed as a nation that free discussion will be likely to lead to the right decisions, that, as Justice Brandeis said, when falsehoods and fallacies abound, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity.

A requirement for precirculation clearance is obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment.

> ". . . [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights * * *.
>
> "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least, for the time." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

The military need for obedience and discipline may justify certain restrictions on speech that would be impermissible in civilian life. As *Parker* v. *Levy*, *supra*, shows, speech that poses a genuine threat of

undermining obedience to orders may subject the speaker to appropriate punishment.[7] If Glines' activities had violated regulations that focused on these considerations, the Air Force's response might be acceptable. Punishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures would adequately protect the government's interest.[8]

The Supreme Court insists on less restrictive alternatives to prior restraint when they are available, and it critically examines whether the restraint will have its intended effect. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 563-70, 96 S.Ct. 2791. Less restrictive alternatives are available.

We have emphasized that these regulations are prior restraints on speech. The government suggests that they are, instead, merely time, place, and manner restrictions. This is how the District of Columbia Circuit treated the same regulations as applied in a

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[7] We do not believe that vocal disagreement with public policy by itself necessarily leads to disobedience to orders. "I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means." *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. 325, 335, 511 F.2d 1327, 1337 (1975) (Bazelon, J., dissenting).

[8] See the limitations the district court adopted, and we approved on appeal, in *Allen* v. *Monger*, 404 F.Supp. 1081, 1090 (N.D.Cal. 1975), *aff'd supra*.

combat zone. *Carlson* v. *Schlesinger*, *supra*. A combat zone, of course, is only a small part of the total military deployment. Restrictions there do not necessarily support restrictions throughout all other military reservations. Indeed, to treat these regulations as time, place, and manner restrictions necessarily implies that there must be other places within the military jurisdiction where petitioning by military personnel is permitted. Assuming that we would agree with the majority in *Carlson*, therefore, we do not think *Carlson* compels us to give combat-zone status to the regulations when applied here.

The Supreme Court also treated similar restrictions applied to civilian political campaigning as time, place, and manner restrictions in *Greer* v. *Spock* 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The question there was whether uninvited civilians could come on the base, where they had no clear right to be, for political purposes. That is quite a different question from that of direct restraints upon the exercise by military personnel of the right of free speech.

It may be argued that the challenged regulations cover activity, such as petitioning in a combat zone, on which the military may legitimately impose prior restraints. The regulations are nevertheless void because they are overbroad. Since they affect Glines' activities, he has standing to challenge their overbreadth. *Parker* v. *Levy*, 417 U.S. at 760-61, 94 S.Ct. 2547; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Overbreadth appears from a cursory reading. The regulations deal with protected expression and could cover virtually all controversial written material. The commanding officer makes the decisions, and his views are centered on his command, not on abstract First Amendment values. The regulations, indeed, allow him to prohibit distribution partly because "the material is critical of Government policies or officials." AFT 35-15(a)(4). Glines' case itself shows that commanding officers may be unsympathetic to even the most innocuous exercise of First Amendment rights. Finally, the restrictions exceed anything essential to the government's interests. *United States* v. *O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1967). The regulations are valid, if at all, only in the limited setting of a combat zone. Their overbreadth is substantial.[9] *Broadrick* v. *Oklahoma*, 413 U.S. at 615-16, 93 S.Ct. 2908.

IV. *Jurisdiction to Award Damages*

For the reasons we have already given, we hold that the district court was correct in declaring the regulations void, enjoining their enforcement, and ordering Glines reinstated in a status that is consistent with his status before he was relieved from active duty. How-

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[9] The majority in *Carlson* v. *Schlesinger*, 167 U.S.App.D.C. at 331-332, 511 F.2d at 1333-34, also questioned the regulations' breadth but stopped short of a finding of overbreadth. Judge Bazelon, dissenting, viewed them as invalid, as applied, and overbroad. 167 U.S.App.D.C. at 333, 511 F.2d at 1335.

ever, it lacked jurisdiction to award him back pay, and we must vacate that part of its judgment.

Under the Tucker Act, a district court has jurisdiction to award damages against the United States to a maximum of $10,000. All other monetary claims must go to the Court of Claims. 28 U.S.C. § 1343(a)(2). There is no such restriction on actions seeking nonmonetary relief or actions claiming that a government official acted in violation of the Constitution or of statutory authority. The reason is that in these situations Congress has either waived sovereign immunity or the doctrine does not apply. 5 U.S.C. § 702; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-91, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Hill* v. *United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); 14 Wright, Miller, and Cooper, Federal Practice and Procedure § 3655 (Supp. 1977). These doctrines justify the district court's judgment except for its award of back pay. Since the Court of Claims is without jurisdiction to grant general declaratory or equitable relief, the district court had no reason to defer to it. 28 U.S.C. § 1491; *United States* v. *Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States* v. *King*, 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969).

Congress has waived sovereign immunity when damages will be paid from the public treasury only if the claimant sues under the Tucker Act in the proper court. Glines did not plead Tucker Act jurisdiction, and in any event the district court awarded him an amount in excess of its Tucker Act authority. While

a district court may give damages as an incident to a declaratory judgment, it may do so only if such relief would otherwise be within its jurisdiction. 28 U.S.C. §§ 2201, 2202; *United States* v. *King*, 395 U.S. at 3-4, 89 S.Ct. 1501.

Glines argues that sovereign immunity is inapplicable, and the district court therefore had jurisdiction under 28 U.S.C. § 1331, because he alleged that the regulations are unconstitutional and in violation of a statute. He cites *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, in support of his position. However, he does not come within the *Larson* exception to sovereign immunity. The Supreme Court specifically noted in *Larson* that a suit would still fail as against the sovereign if relief would require affirmative action or the disposition of sovereign property. 337 U.S. at 691 n.11, 69 S.Ct. 1457. Glines' action is of this nature. His relief must come from the Court of Claims. The government, of course, could not relitigate in that forum any issues which have been decided against it here.

We affirm the judgment of the district court except for its award of back pay. We vacate that award and remand it to the district court with instructions either to dismiss the claim without prejudice to another action in the Court of Claims or to transfer that part of the case to the Court of Claims directly. *Sherar* v. *Harless*, 561 F.2d 791, 794 (9th Cir. 1977).

Affirmed in part: vacated and remanded in part.

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